IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 26TH MARCH 2007 / 5TH CHAITHRA 1929

SA.No. 744 of 1993(E)

AS.59/1991 of SUB COURT, MUVATTUPUZHA
OS.580/1988 of MUNSIFF COURT,MUVATTUPUZHA

.....

APPELLANT: /DEFENDANT

A.P.YOHANNAN
ERATHAYNICKAL HOUSE
ONAKOOR VILLAGE, PAMPAKUDA KARA
MUVATTUPUZHA.

BY ADV. SRI.T.N.HAREENDRAN.
SRI.P.J.PHILIP

RESPONDENT:/PLAINTIFF

MR.C.U.SKARIA, AGED 59,
SON OF OUSEPH, CHENNEKATTU VEEDU
NERIAMANGALAM VILLAGE, KOTHAMANGALAM.

BY ADV. SRI.THOMAS V JACOB, SAJI THOMAS
SUJITH MATHEW JOSE

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26/03/2007 ALONG WITH SA NO. 366OF 1993 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1602/1993 IN S.A.NO.366/1993

26.3.07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

==========

S.A. NO.366 & 744 OF 1993

==========

Dated this the 26th day of March 2007

JUDGMENT

Defendant in O.S.580/1988 on the file of Munsiff Court, Muvattupuzha is the appellant. Plaintiff therein is the respondent. Respondent instituted the suit seeking a decree for realisation of Rs.4050/- with interest alleging that appellant purchased two pairs of teak settees from Chennekattu Furniture Mart the proprietory concern of respondent at Neriamangalam while appellant was working as Salestax Officer at Kothamangalam. It was contended that respondent supplied the furniture at the residence of appellant and though he promised to pay the amount, it was not paid and respondent under Ext.A1 letter demanded the amount, but it was not paid and therefore respondent is entitled to the decree sought for. Appellant filed a written statement contending that on 5.4.1988, he placed orders to

supply two pairs teak settees, one teak shelf and one table for Rs.3000/-, Rs.4000/- and Rs.8000/- respectively and towards the cost of furniture viz Rs.15,000/-, Rs.8000/- was paid as advance. It was contended that when respondent failed to supply the furniture, appellant informed him that police complaint will be filed and thereafter on 26.6.1988 two pairs of teak settees were supplied and the table and shelf were not supplied and therefore appellant sent Ext.B2 notice and appellant is entitled to get the balance of Rs.5000/- deducting the cost of two pairs of settees supplied by respondent. Appellant also preferred a counter claim for that amount. Respondent filed a written statement to the counterclaim disputing the allegation and reiterating the contentions raised in the plaint.

2. Learned Munsiff framed the necessary issues. On the evidence of Pws.1 and 2, D.Ws.1 and 2, and Exts.A1 to A5(a) and Exts.B1 and B2, learned Munsiff disbelieved the case of both the appellant

and respondent and dismissed the suit and the counterclaim. Challenging the dismissal of the counter claim, defendant filed A.S.59/1991. Challenging the dismissal of the suit, respondent filed A.S.58/1991 before Sub Court, Muvattupuzha. Learned Sub Judge on reappreciation of evidence allowed A.S.58/1991 and confirmed the dismissal of the counterclaim and granted a decree in favour of the respondent. Challenging the decree granted in A.S.58/91 defendant filed S.A.366/93. Challenging the dismissal of A.S.59/91, he filed S.A.744/93.

3. Both the appeals were admitted on formulating the following substantial questions of law.

1) Whether on the evidence and circumstance of the case courts below should have accepted the evidence of appellant that he paid Rs.8000/- as advance towards the value of teak settees, table and shelf and if so, whether appellant is entitled to a decree in the counterclaim.

2) Whether the first appellate court was

correct in granting a decree in favour of the respondent?

4. Learned counsel appearing for appellant was heard. There was no representation for respondent when the appeal was taken.

5. The argument of learned counsel appearing for appellant was that when examined as PW1, respondent admitted that he is maintaining an order book, which if produced would have revealed that when the order was placed and what exactly was the order and whether it was in respect of two teak settees alone as claimed by respondent or apart from the settees the order included a shelf and a table. It was also argued that PW2 who was examined on the side of respondent and who was present at the time of supply of the settees at the residence of the appellant, did not depose that original of Ext.A3(a) bill to appellant was given to appellant at that time and therefore courts below should not have accepted the evidence of respondent and should have believed the case of

appellant especially when the payment of Rs.8000/- as advance is corroborated by the relevant entry in Ext.B1 Diary maintained by appellant. Learned counsel vehemently argued that appreciation of evidence by the first Appellate Court was perverse and if the evidence was properly appreciated, case of appellant should have been accepted and that of the respondent and his witness should have been disbelieved.

6. The fact that respondent is running a proprietory concern was not disputed. The fact that on 26.6.1988 respondent supplied two pairs of teak settees to the appellant and that too at his residence, after transporting the two settees from his shop in the vehicle driven by PW2 was not disputed. When examined as DW1, appellant admitted these facts. Therefore evidence establish that there was supply of two pairs of teak settees at the residence of the appellant on 26.6.1988 in the presence of PW2.

7. When it is the case of the respondent that

the only order and transaction was to supply the said two pairs of settees for Rs.4050/-, case of appellant was that the order was to supply in addition to the settees supplied, one shelf for Rs.4000/- and one table for Rs.8000/- and out of the total value of Rs.15,000/-, Rs.8000/- was paid. There was only oath against oath for the amount paid as advance by the appellant, and denied by the respondent, and also on the actual order placed, whether it was only with regard to the settees or inclusive of table and shelf.

8. Respondent produced Ext.A3 bill book containing the relevant Ext.A3(a) carbon copy of the bill issued to the appellant in respect of the sale of two settees and Ext.A2 the goods Vehicle record evidencing the transport of the settees by the respondent and Ext.A4 account book maintained by the respondent in the ordinary course of his business containing Ext.A4(a) entry regarding supply and value of the two teak settees on 26.6.1988 and Ext.A5 Ledger for the year 1988-89

maintained by respondent in the ordinary course of his business at his shop containing Ext.A5(a) entry relating to the transaction. Appellant on his part produced Ext.B1 Diary containing Ext.B1(a) entry for payment of Rs.8000/- on 5.4.1988.

9. It is true that when cross examined PW1 admitted that an order book is maintained. That order book was not produced. But it is to be born in mind that admittedly when the order was placed and the settees were supplied, appellant was the Salestax Officer of the area and respondent was engaged in the business of furniture for which salestax is to be paid. In such circumstance, even if no entry is made in the order form book with regard to the transaction, it is not a reason to disbelieve the case of the respondent especially when appellant has no case that when he allegedly placed orders for the settees, shelf and table an order form was prepared. Though PW1 admitted that he used to maintain an order book, he was not further asked whether the order placed by appellant

for the furniture was recorded in the order book. There is no evidence to prove that the order book contained an entry with regard to the order placed by appellant for the furniture. Therefore for the non-production of the order form, both evidence of PW1 cannot be disbelieved.

10. Eventhough PW2 did not depose that the original of Ext.A3(a) was not issued to the appellant by the respondent, PW1 had no case that original of Ext.A3 was issued to the appellant in the presence of PW2. As there is no case or evidence that the issuance of the bill relating to the transaction was in the presence of PW2, failure of PW2 to mention the passing of the bill to appellant is not a ground to disbelieve the evidence of PW1. When the entire evidence is appreciated in the proper perspective, it cannot be said that the view taken by the first appellate Court, on the appreciation of evidence, is not a possible and reasonable view. The learned Sub Judge did not omit to take note of any material

evidence warranting reappreciation of evidence. On going through the records, I find no reason to interfere with the appreciation of evidence by first appellate Court, in exercise of the powers of this court under section 100 of the Code of Civil Procedure. On the evidence first appellate Court accepted the evidence of PW1 corroborated by the relevant entries inExt.A3(a), A4(a) A5(a) and as well as that of Pws1 and 2 and held that the transaction was only in respect of two teak settees and that too for a value of Rs.4050/- which was not paid by the appellant and appellant did not pay Rs.8000/- as alleged in the written statement and counterclaim. The findings are correct. I find no merit in the appeal.

Appeals are dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006